No. 15-274

FEB - 3 2016

# In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,
*Petitioners,*

v.

JOHN HELLERSTEDT, M.D., COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *et al.*,
*Respondents.*

*On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## BRIEF OF *AMICUS CURIAE* AND THEN THERE WERE NONE IN SUPPORT OF RESPONDENTS

Stephen Casey
*Counsel of Record*
Texas Center for Defense of Life
501 S. Austin Avenue, Ste. 1130
Georgetown, Texas 78626
(512) 763-9068 - Telephone
info@caseylawoffice.us

*Counsel for Amicus Curiae And Then There Were None*

Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The application of ASC regulations rationally relates to improving women's health care, a logical national legislative response to the Gosnell scandal. 3

II. Texas passed HB2 with rationally-related goals of improving women's health and safety, a nation-wide "lesson learned" from the Gosnell scandal. 6

A. ASC operational standards rationally relate to improved health standards for women seeking abortion. 7

B. The general safety requirements of ASCs rationally function to improve women's health and safety. 10

C. The physical-plant requirements for ASCs rationally relate to improved health and safety for women. 11

III. At bottom, Petitioners seek a judicial subsidy so they can operate with lower health standards. 12

CONCLUSION 16

## TABLE OF AUTHORITIES

### CASES

*Gonzales v. Carhart*,
550 U.S. 124 (2007) 8

*Simopoulos v. Va.*,
462 U.S. 506 (1983) 7, 10

### STATUTES

25 Tex. Admin. Code § 135.41 10

25 Tex. Admin. Code § 135.41(c)(3) 10

25 Tex. Admin. Code § 135.41(f)(2) 10

25 Tex. Admin. Code § 135.41(h) 10

25 Tex. Admin. Code § 135.52 11

25 Tex. Admin. Code § 135.52(e)(1)(B)(i) 12

25 Tex. Admin. Code § 135.52(e)(1)(B)(iii)(I) 12

25 Tex. Admin. Code § 135.52(e)(1)(B)(vi) 12

### OTHER AUTHORITIES

Steven H. Aden, *Driving out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion*, 8 UNIV. ST. THOMAS J. LAW & PUB. POL. 1 (2013) 12, 15

American College of Obstetricians and Gynecologists (ACOG), Standards for Obstetric-Gynecologic Services (5th ed. 1982) 9

Bill Analysis, Tex. HB2, 83d Leg., 2d C.S. (July 9, 2013) (House Bill Analysis), http://www.hro.house.state.tx.us/pdf/ba832/hb0002.pdf 7

Esme E. Deprez, *The Vanishing Abortion Clinic*, BLOOMBERG BUSINESSWEEK (Nov. 27, 2013), accessible at http://www.businessweek.com/articles/2013-11-27/abortion-clinics-face-shutdown-spiral-as-republicans-push-restrictions 14

"Dilation & Curretage," Johns Hopkins Health Library, www.hopkinsmedicine.org, available at http://www hopkinsmedicine org/healthlibrary/test_procedures/gynecology/dilation_and_curettage_d_and_c_92,P07772/ 8

Grand Jury Rprt., *In re Cnty. Investigating Grand Jury XXIII*, No. 0009901-2008, WL 711902 (1st Jud. Dist. Pa. Jan. 14, 2011), available at <http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf> *passim*

Paul Luce, *Planned Parenthood, Philly Archdiocese equally dismayed.* DELAWARE CTY DAILY TIMES, Jan 20, 2011, available at <http://www.delcotimes.com/general-news/20110120/planned-parenthood-philly-archdiocese-equally-dismayed?viewmode=fullstory> 4, 14

Beth A. Rosenson, *The Shadowlands of Conduct: Ethics and Politics* (Georgetown University Press, 2005) 3

Senate Research Ctr., Bill Analysis, Tex. HB2, 83rd Leg., 2d C.S. (July 11, 2013) (Senate Bill Analysis), http://www.capitol.state.tx.us/tlodocs/832/analysis/pdf/HB00002E.pdf 7

Stephanie Simon, *Planned Parenthood Hits Suburbia*, WALL STREET JOURNAL ONLINE (June 23, 2008), http://online wsj com/news/articles/SB121417762585295459 15

## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* And Then There Were None (ATTWN) is a 501(c)(3) organization. Formed in 2012, it helps abortion clinic workers leave the abortion industry and find employment and healing resources out of the abortion industry. To date, ATTWN has helped 210 abortion workers leave the industry.

ATTWN is uniquely positioned to discuss HB2 and the need for improved women's health care standards as all of its members are former abortion clinic workers and physicians who have first-hand knowledge of and experience in the abortion clinic environment.

Petitioners and Respondents have consented to the filing of the brief.[1]

## SUMMARY OF ARGUMENT

Texas, in the wake of national horror about the atrocities in women's health discovered at Women's Medical Society in Philadelphia, Pennsylvania—the Kermit Gosnell scandal—utilized its compelling state interest in protecting women's health through regulating medical services and recognized by this Court for over 20 years, passed House Bill 2 (HB2) in 2013. It requires that abortion facilities meet the requirements of ASCs (Ambulatory Surgical Centers).

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

ASCs provide a uniform standard of care for persons seeking outpatient procedures that may result in significant complications requiring emergency medical care. The common sense design standards and other requirements provide a floor of rationally-related safeguards to improve the health care of outpatients. This applies to abortion procedures.

Petitioners' complaints arise not in presentation of any undue burden, as Texas has over 450 ASCs throughout the state. Rather, Petitioners make, in essence, a plea for this Court to grant it an economic subsidy through disregarding the state interest in protecting women's health as Petitioner's interest propagates from an economic challenge.

ASCs are a rational—and in the current national context—needed advance in women's health. Countless stories exist nationwide where the political football of abortion overshadowed the need for the protection of women within the abortion context.

This Court should uphold the compelling interest of Texas in women's health and affirm the Fifth Circuit's approval of the ASC regulatory structure.

## ARGUMENT

### I. The application of ASC regulations rationally relates to improving women's health care, a logical national legislative response to the Gosnell scandal.

Changes in national perspective following investigations and exposés are common to American life. For example, Upton Sinclair's 1906 exposé, *The Jungle*, highlighted the disgusting conditions of the Chicago meatpacking industry. In response, an aghast Congress passed the Pure Food and Drug Act of 1906 and the Meat Inspection Act, designed to improve the health and welfare of citizens by regulating the meatpacking industry.

The Watergate scandal exposed government opacity and corruption; in response, Congress enacted the Government in Sunshine Act (1976) and the Ethics in Government (1978) and Ethics in Presidential Records (1978). State legislatures followed suit, passing significant ethical disclosure laws focused on transparency and conflicts of interest. *See generally* Beth A. Rosenson, *The Shadowlands of Conduct: Ethics and Politics* at 91 (Georgetown University Press, 2005).

The Kermit Gosnell scandal rocked observers on both sides of the abortion question. The Delaware County Daily Times quoted Planned Parenthood of Southeast Pennsylvania CEO Dayle Steinberg, condemning Gosnell's actions and stating, "All women should have access to high-quality care when they are

vulnerable and facing difficult decisions."[2] Similarly, the Archidiocese of Philadelphia remarked, "The repeated actions of Dr. Gosnell and his staff were abhorrent and intrinsically evil in their disregard for the lives of the unborn and the welfare of the women who sought their services."[3]

Intrinsic to Gosnell's lack of care and the harsh conditions experienced by women in his clinic were faulty health standards. For example, the Grand Jury Report identified multiple egregious health and safety failures:[4]

- Blood-stained floors and blankets;[5]
- Urine-splattered walls;[6]
- A household pet roaming the facility;[7]

---

[2] Paul Luce, *Planned Parenthood, Philly Archdiocese equally dismayed.* DELAWARE CTY DAILY TIMES, Jan. 20, 2011, available at <http://www.delcotimes.com/general-news/20110120/ planned-parenthood-philly-archdiocese-equally-dismayed?viewmode=fullstory> (last accessed Jan. 31, 2016).

[3] *Id.*

[4] *See* Grand Jury Rprt., *In re Cnty. Investigating Grand Jury XXIII*, No. 0009901-2008, WL 711902 (1st Jud. Dist. Pa. Jan. 14, 2011), available at <http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf> (last accessed Jan. 31, 2016) (hereinafter "*Grand Jury Rprt.*").

[5] *See id.* at 20.

[6] *Id.* at 45.

[7] *Id.* at 20.

- Wholly unsanitary surgical procedure rooms;[8]
- Unsterilized equipment;[9]
- Rusty and outdated equipment;[10]
- Uninspected emergency and safety equipment;[11]
- No functioning resuscitation or monitoring equipment;[12]
- Blocked and inaccessible emergency exits;[13]
- Hallways too narrow in which to maneuver stretchers;[14]
- Biohazardous "fetal remains haphazardly stored throughout the clinic—in bags, milk jugs, orange juice cartons, in cat-food containers," "in a refrigerator," and in a freezer;[15]
- Medical waste piled high in the basement;[16] and

---

[8] *Id.*

[9] *Id.*

[10] *Id.* at 20-21.

[11] *Id.* at 21.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

- the remains of 45 fetuses scattered throughout the clinic.[17]

The grand jury concluded that his facility was "grossly inadequate and unsanitary," operated with a "pretext of providing health care." Gosnell's clinic, in the grand jury's report, stood "as a monument to an absolute disdain for the health and safety of women "[18]

The grand jury concluded its lengthy report with several recommendations, one of which applies here: abortion facilities should meet the standards of care of ambulatory surgical centers.[19] "There is no justification," the grand jury wrote, "for denying abortion patients the protections available to every other patient of an [ASC], and no reason to exempt abortion clinics from meeting these standards."

## II. Texas passed HB2 with rationally-related goals of improving women's health and safety, a nation-wide "lesson learned" from the Gosnell scandal.

Texas, along with five other states, followed the pattern identified in "I.," *supra*, and responded to the Gosnell scandal with legislative activity aimed at avoiding the tragedies that occurred at 3801 Lancaster (Gosnell's clinic). *See* Resp. App. 3a-4a. Texas' stated

---

[17] *Id.*

[18] *Id.*

[19] *Id.* at 248-50. The Pennsylvania law terms these "Ambulatory Surgical Facilities," a synonymous term with Texas' ASCs.

goal was to provide abortion patients with "the highest standard of health care." Senate Research Ctr., Bill Analysis at 2, Tex. HB2, 83rd Leg., 2d C.S. (July 11, 2013) (Senate Bill Analysis), http://www.capitol.state.tx.us/tlodocs/832/analysis/pdf/HB00002E.pdf; *see* Bill Analysis at 10, Tex. HB2, 83d Leg., 2d C.S. (July 9, 2013) (House Bill Analysis), http://www.hro.house.state.tx.us/pdf/ba832/hb0002.pdf (stating that higher standards will help prevent a "Kermit Gosnell" situation).

ASC, while not hospitals, provide broad categories of professional-level service in areas of operation, general safety, and architecture. They do so for outpatient procedures, thereby reducing cost while still protecting from contagions. Pet. Br. 17; *see Simopoulos v. Va.*, 462 U.S. 506, 519 (1983) (describing ASCs in upholding Virginia's requirement that abortions after the first trimester be performed in ASCs or hospitals) Each of these areas in HB2—operation, safety, and architecture, rationally address a "lesson learned" from the Gosnell experience and deserve deference from this Court.

### A. ASC operational standards rationally relate to improved health standards for women seeking abortion.

One significant non-sequitur by Petitioners is that a sterile environmental requirement of ASCs does not offer significant benefit to women. Pet. Br. 19. Petitioners argue that because the vagina, as a bodily orifice, is not sterile, that the environment need not be sterile. Yet the instruments don't stop at the vagina. The instruments breach the cervix and "scoop" out the

fetal contents. Petitioners claim it involves no incision, i.e., cutting of tissue. Pet. Br. 14.

This flawed chain of reasoning disregards the nature of abortion, both in medical literature and in this Court's own statements. The entire purpose of surgical abortion, both D&C (dilation and curettage) and D&E (dilation and extraction), is to scrape or cut the developing fetus away from the uterus to which it is attached, along with the placenta. *See* "Dilation & Curretage," Johns Hopkins Health Library, www.hopkinsmedicine.org ("The curette will be inserted through the cervical opening into the uterus and the sharp spoon-shaped edges will be passed across the lining of the uterus to scrape away the tissues."), available at http://www.hopkinsmedicine.org/healthlibrary/test_procedures/gynecology/dilation_and_curettage_d_and_c_92,P07772/ (last accessed Feb. 1, 2016); *see also Gonzales v. Carhart*, 550 U.S. 124, 181-182 (2007) (Ginsburg, J., dissenting) (describing surgical dilation & extraction (D&E) as "equally brutal, involving as it does tearing a fetus apart and ripping of its limbs.") (internal citations and quotation marks omitted). Petitioners soft-pedal around the medical reality.

Requiring a sterile environment prevents the environment from contaminating a sterile instrument, which would then carry any septic bodies into the uterus, into direct contact with the patient's blood. In the context of an abortion, post-procedure infections are not uncommon. *See* Br. *Amicus Curiae* Priests for Life at 8 ("I went back to the doctor [after the abortion] and was diagnosed with a vaginal infection]); 21 ("A few days later my doctor told me I had an infection in

my uterus as a result of the abortion."); 32 ("[I had a] serious fever of nearly 105 degrees for almost the entire week. My body was shutting down, due to major infection from septic abortion"); 34 ("infection after infection in my womb"). Simply requiring a sterile environment values women's health and safety and is a small burden when compared to the possibility of medical sepsis and death.

This Court recognized this rational relationship when it cited medical authorities for the proposition that quality standards of sterile environs should apply to abortions as well as other outpatient procedures.

> The medical profession has not thought that a State's standards need be relaxed merely because the facility performs abortions: "Ambulatory care facilities providing abortion services should meet the same standards of care as those recommended for other surgical procedures performed in the physician's office and outpatient clinic or the free-standing and hospital-based ambulatory setting." American College of Obstetricians and Gynecologists (ACOG), Standards for Obstetric-Gynecologic Services 54 (5th ed. 1982). See also id., at 52 ("Free-standing or hospital-based ambulatory surgical facilities should be licensed to conform to requirements of state or federal legislation"). Indeed, the medical profession's standards for outpatient surgical facilities are stringent: "Such facilities should maintain the same surgical, anesthetic, and personnel standards as recommended for hospitals."

*Simopoulos v. Va.*, 462 U.S. 506, 517 (1983). This Court should follow the stated opinion of the experts and provide women the best possible health care available commensurate with the procedure at hand.

### B. The general safety requirements of ASCs rationally function to improve women's health and safety.

ASCs, because they are not hospitals, may need to refer a patient to a hospital in the event an emergent situation arises which it lacks the ability to handle. An acknowledged failure in the Gosnell case—lack of emergency building access—resulted in death of Karnamaya Mongar because (1) the emergency exit was locked and an inordinate amount of time was wasted finding the keys, and (2) first responders were hampered by the maze of cramped hallways. *See Grand Jury Rprt.* at 129.

In that event, 25 Texas Administrative Code § 135.41 ensures access to the building because it requires quarterly drills that simulate the evacuation of patients in response to a fire alarm. *See* 25 Tex. Admin. Code § 135.41(c)(3). Furthermore, first responders such as fire teams (who generally include paramedics) will have prior access to the building layout, *id.* at § 135.41(f)(2), and the building codes will operate naturally to ensure safe access. *Id.* at § 135.41(h). These requirements are easy with which to comply, and critical in case of emergency to protect patient safety. The ASC requirements that promote access to patients in case of an emergency and aid first responders are rationally related to improving women's health and safety and should be upheld.

### C. The physical-plant requirements for ASCs rationally relate to improved health and safety for women.

Fundamental layout requirements make ASCs a standard of women's safety. The Gosnell grand jury, which represented "a spectrum of personal beliefs about the morality of abortion,"[20] nevertheless expressed dismay at the failures of The Women's Medical Society to facilitate women's health and safety due to basic architectural flaws that would not exist were it to function as an ASC.

> The physical layout of the clinic, a confusing maze of narrow hallways and multiple twisting stairways, should have been an obvious bar to its use for surgical procedures. The three-story structure, created by joining two buildings, had no elevator. Access from procedure rooms to the outside by wheelchair or stretcher was impossible, as was evident the night Karnamaya Mongar died.

*Grand Jury Rprt.* at 45. Firefighters "struggled to get the door open" because no person at the clinic could identify the key for the locks. *Id.* at 129.

Texas' ASC physical requirements avoid the risk posed by physical obstructions, including several rational protective measures such as minimum clearances around patient areas, beds, operating rooms, and stretcher storage (to prohibit hallway congestion). *See generally* 25 Tex. Admin. Code § 135.52. The Code also requires ambulance access on

---

[20] *Grand Jury Rprt.* at 1.

at least two exits, *id.* at § 135.52(e)(1)(B)(i), a minimum hallway width of four (4) feet in public corridors, *id.* at §§ 135.52(e)(1)(B)(iii)(I), and doorways of three feet, eight inches. 135.52(e)(1)(B)(vi).

Each of these requirements are exemplars of the types of common sense safety measures by which ASCs are able to perform lower-risk procedures that may result in life-threatening complications when circumstances do not go as planned. The State of Texas has a justified interest in regulating all outpatient medical procedures, not just abortions. By folding in abortions to a preset standard of care, one avoids making the political football of abortion subservient to women's health.

## III. At bottom, Petitioners seek a judicial subsidy so they can operate with lower health standards.

Petitioners' arguments are not about access to abortion; rather, they seek a judicial subsidy so they can operate with lower health standards. *See* Steven H. Aden, *Driving out Bad Medicine: How State Regulation Impacts the Supply and Demand of Abortion*, 8 UNIV. ST. THOMAS J. LAW & PUB. POL. 1 at 17 (2013). By enacting judicial roadblocks to improved women's health care, the government in essence "subsidizes" the abortion supply market because many substandard providers remain in the market, to the detriment of women. By permitting rational forces to operate in the abortion market, the converse is true: women's health is improved. Petitioners simply dislike the dispassionate market forces.

This economic protest—and effective plea for a subsidy—appears thinly veiled, or plainly requested within Petitioners' brief.

Beginning on page 7, Petitioner complains about the following requirements, all suggested in terms of Petitioner's monetary costs, all of which are determined by Petitioner's ***cost to provide abortion*** and not on any substantial obstacle to ***access to abortion***.

Petitioners complain about:

- Having to hire more nursing staff;[21]
- Conducting a one-way traffic pattern in the facility;[22]
- Constructing a larger operating room;[23]
- Building a better HVAC system;[24]
- Having to buy a bigger piece of property for its business;[25]
- Having to spend more money to comply with the standards;[26]

Oddly, and implying agreement with the economic nature of Petitioners' problems, the brief of *Amicus Curiae* Planned Parent Federation of America

---

[21] Pet. Br. at 7.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

("PPFA"), et al., demonstrates this point. For example, PPFA states that it is costly to build an ASC. Br. PPFA 7-12. PPFA should know, as it built two ASCs after the 2003 post-15-week law was passed. *Id.* at 7 PPFA has no plans to build additional ASCs. *Id.* at 8. Yet, PPFA did not bring this lawsuit. PPFA is the "oldest and largest provider of reproductive health care in the United States," *id.* at 2, and provides abortions at ASCs in Austin, Dallas, Fort Worth, Houston, and San Antonio. *Id.* This is the "subsidy" difference. PPFA, as part of its business model, can economically afford to give women the high level of care they deserve and that ASCs provide, a necessary component of women's health protection stated publicly by its Pennsylvania affiliate in the immediate aftermath of Gosnell.[27]

This conclusion is not novel. News outlets such Bloomberg *Businessweek* and the *Wall Street Journal* identify this argument revolves around market competition. *Businessweek* noted that with state regulations raising the level of women's health requirements in the abortion context, small, independent abortion businesses struggle to stay open, while larger operators were not significantly affected.[28] The operator of Petitioner Whole Women's Health, Amy Hagstrom-Miller, complained to the *Wall Street*

---

[27] *See* Luce, *Planned Parenthood, Philly Archdiocese equally dismayed.* at n.2, *supra*. (The Pennsylvania Planned Parenthood affiliate stated, "All women should have access to high-quality care when they are vulnerable and facing difficult decisions.").

[28] *See* Esme E. Deprez, *The Vanishing Abortion Clinic*, BLOOMBERG BUSINESSWEEK (Nov. 27, 2013), accessible at http://www.businessweek.com/articles/2013-11-27/abortion-clinics-face-shutdown-spiral- as-republicans-push-restrictions.

*Journal* about Planned Parenthood's business dominance. She "competes with Planned Parenthood for abortion patients—and finds it deeply frustrating."[29]

Economists have studied the market response to changes in abortion regulations.[30] The bookends of this debate, involving either (1) striking down nearly all state laws by federal intervention or (2) leaving the states to enact regulation, result in a market swing of roughly 12 to 21 percent.[31] This small difference, the economic data suggests, is mainly due to shifts in demand, a market force.[32] This further supports the conclusion that Petitioners' argument are less complaints about access to abortion (properly addressed in the courtroom) and rather grumbling about their weaker business models (properly addressed in the marketplace).

Petitioners' complaints thus are revealed for what they truly are: economic pleas for a judicial subsidy to increase the bottom line for a smaller provider in the face of shrinking demand. This Court should not be in the business of picking economic winners and losers in the context of abortion case law when the simple question to be answered is whether women are receiving better quality care with the passage of HB2

---

[29] Stephanie Simon, *Planned Parenthood Hits Suburbia*, WALL STREET JOURNAL ONLINE (June 23, 2008). http://online.wsj.com/news/articles/SB121417762585295459.

[30] *See* Aden, *Driving Out Bad Medicine*, at 32.

[31] *Id.*

[32] *Id.*

and whether is HB2 rationally related to the legitimate state interest of women's health care. The Gosnell scandal shocked the nation and led to several rational improvements in women's care. This Court should rejects Petitioners' plea for a judicial subsidy; Petitioners should be made to survive in the free market. This Court should uphold the ASC requirements of HB2.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Stephen Casey
*Counsel of Record*
Texas Center for Defense of Life
501 S. Austin Avenue, Ste. 1130
Georgetown, Texas 78626
(512) 763-9068 - Telephone
info@caseylawoffice.us

*Counsel for Amicus Curiae*
*And Then There Were None*